Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

FREEDOM COMMUNICATIONS, INC.,
d/b/a THE MONITOR,

Petitioner,

vs.

THE HONORABLE FERNANDO MANCIAS, JUDGE OF THE 93RD JUDICIAL DISTRICT COURT OF HIDALGO COUNTY, TEXAS; PAULINE G. GONZALES, CLERK OF HIDALGO COUNTY DISTRICT COURTS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether "the interests of comity" require a federal district court, in a suit brought under 42 U.S.C. § 1983, to abstain from granting relief in a case in which the First Amendment right to access judicial records has been unconstitutionally abridged by a state rule of procedure.

PARTIES

The plaintiff below was Freedom Communications, Inc., doing business as *The Monitor*, a daily newspaper based in McAllen, Texas. Freedom Communications has no parent company.

The defendants below were the Honorable Fernando Mancias, Judge of the 93rd Judicial District Court of Hidalgo County; Ms. Pauline G. Gonzalez, the Clerk of the Hidalgo County District Courts; and the State of Texas.

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PETITION FOR WRIT OF CERTIORARI

Freedom Communications, Inc., and its daily newspaper, *The Monitor*, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit, (App. 1), and the district court, (App. 24), are unpublished.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. The opinion of the U.S. Court of Appeals for the Fifth Circuit was issued on October 9, 1997, and the petitioner's petition for rehearing was denied on December 4, 1997. This case involves a federal question under 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Consitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On June 2, 1987, without notice or hearing, a Texas state trial court sealed a file in a divorce case that later would become of great interest to the public. One of the parties to those divorce proceedings was Ruben Hinojosa, elected in 1996 to the U.S. House of Representatives for the Fifteenth Congressional District, which covers part of the Texas Rio Grande Valley. When Mr. Hinojosa ran for Congress in 1996, the petitioner's daily newspaper, *The*

Monitor, attempted to review the official court file for Mr. Hinojosa's 1987 divorce, only to find that the entire file had been sealed. The litigation in the district court involved significant questions involving press rights, the constitutionality of Texas court rules, and federal procedure. Accordingly, at its October 31, 1996, hearing, the district court recognized that "This case is bigger than the election in Hidalgo County, of anybody."

A. The Texas state court's refusal to hear *The Monitor*'s request for access.

After discovering that the records had been sealed, *The Monitor* immediately asked the respondent, the Honorable Fernando Mancias, to vacate his court's sealing order. In response, Mr. Hinojosa's counsel entered a formal appearance in the litigation to argue that the state trial court had no jurisdiction to consider a request to intervene and vacate the order sealing the court file, filed by *The Monitor*, because a final judgment had long ago been entered in Mr. Hinojosa's divorce case. Judge Mancias, however, ruled that he had no jurisdiction to consider the petitioner's request to vacate the sealing order after his court's final judgment took effect. (App. 4.) This ruling was based on a Texas Supreme Court decision involving similar circumstances. *Times-Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987).

In this litigation, it is uncontested that Texas law, as applied by Judge Mancias, violates the First Amendment requirement that court records will not be sealed without notice and hearing. The district court specifically found a

First Amendment violation. (App. 25.) Judge Mancias did not appeal this finding.

B. The district court's initial dismissal on res judicata grounds.

As a result of Judge Mancias's ruling, *The Monitor* filed the underlying action in the United States District Court for the Southern District of Texas, McAllen Division. The case was transferred to the Corpus Christi Division of the Southern District after the original judge voluntarily recused himself.

The Monitor asked the district court for declaratory and injunctive relief provided by 42 U.S.C. § 1983. The primary relief requested by the newspaper was originally for an order that Judge Mancias schedule and conduct a publicly-noticed hearing and to make specific findings, consistent with First Amendment-based access requirements, sufficient to allow appellate review. Alternatively, *The Monitor* asked the district court to conduct its own review of the state court file.

On the eve of the primary congressional election, the district court dismissed the section 1983 action, holding that the newspaper's initial request to the state trial court to vacate its sealing order barred the litigation of the issues in federal court. (App. 7, 8-10.)

C. The court of appeals' remand for "consideration of the merits."

The Monitor immediately appealed to the United States Court of Appeals for the Fifth Circuit. In an October 17, 1996, decision, the court of appeals reversed the district court's dismissal order and remanded the case for further proceedings "for consideration of the merits of the section 1983 claim." (App. 12-14.)

D. The district court's decision on the merits.

The newspaper's emergency motion for issuance of the mandate was granted, and the district court scheduled the first part of what would be a two-day hearing on Friday, October 31, 1996, four days before the general election, and ordered that the State of Texas be made a party to the litigation. The district court conducted two days of hearings that ended on the eve of the general election.

In the district court hearings *The Monitor* established all the elements of its declaratory and injunctive relief claims:

1. The First Amendment right of access to judicial records attaches to the court file. Therefore, the Texas Rules of Civil Procedure divesting the trial court of jurisdiction unconstitutionally burden *The Monitor*'s First Amendment access rights by making it impossible for *The Monitor* to challenge the sealing order after final judgment in the underlying civil litigation involving the congressional candidate.

2. Denial of access to the court file caused irreparable injury to *The Monitor*'s First Amendment access rights.

3. Once the district court entered a declaratory judgment in favor of *The Monitor*, but denied injunctive relief, there was no time to seek access to the file in the Texas state courts because the District Court's order was entered the day before the general election.

4. The balance of the hardships favors *The Monitor*.

5. The public interest would be served by opening the court file.

The Monitor's evidence was uncontroverted.

No evidence was presented by the State of Texas, the state court trial judge, or the state court clerk to justify sealing the file or to prove that sealing the entire file was the least restrictive option available to the District Court in protecting any competing rights. Moreover, neither candidate Hinojosa nor his ex-wife, or any member of the Hinojosa family, sought to intervene to oppose *The Monitor*'s efforts to open the file.

The district court reached the merits of *The Monitor*'s contentions regarding the procedures that should apply, in a ruling that the court recognized was unprecedented. (App. 17, 25-26.) The court held that *The Monitor* had failed to make an evidentiary showing that the court did not define until after the parties had rested. (App. 17.) After recognizing that *The Monitor* had accurately stated that the burden of proof ordinarily falls on the party advocating closure of court records, the district court stated: "I don't intend to apply the burden that way. Once

the defendants have come forward and placed the case under inquiry in the divorce arena, I'm going to move the burden to the plaintiff instead of the defense." (*Id.*) The court concluded that "the burden is upon the plaintiff to say when and to prove when and why." (App. 19.) This burden could never be met, even if it were announced at the beginning, rather than the end, of an evidentiary hearing. This record has now been sealed for over a decade. Neither the newspaper nor the public could show a particularized need for its unknown contents, nor that all other means of inquiry had been exhausted. This requirement is constitutionally infirm, because it prohibits the public from invoking its right to have a judicial officer balance the public interest in openness with whatever privacy interests may be implicated by the file's contents. The courts are required to protect those interests using the narrowest alternative to closure of the file. *See Press-Enterprise Co. v. Superior Court of Riverside County*, 478 U.S. 1, 15-24 (1986).

E. The court of appeals' opinion.

The Monitor appealed the district courts' decision on the merits. Surprisingly, the Fifth Circuit avoided the merits in the second appeal, in conflict with its earlier opinion in the case. The court of appeals affirmed, albeit on different grounds than articulated by the district court. Although the respondents did not appeal the declaratory judgment and did not argue in the appeal that the district court should have abstained, the court of appeals ruled that the "interests of comity" commanded that the federal court abstain from issuing injunctive relief and that the newspaper should attempt to secure

relief in the state courts, despite the fact that the district court had finally adjudicated the merits of its claims. (App. 2.) The court of appeals also incorrectly held that the newspaper had not demonstrated that it would suffer irreparable harm without injunctive relief, despite the loss of the petitioner's First Amendment rights for months before the primary and general elections. (*Id.*)

The court of appeals charts a course in its opinion that threatens enforcement of First Amendment access rights through actions brought under 42 U.S.C. § 1983. The court affirmed the district court's section 1983-based judgment declaring unconstitutional the two Texas procedural rules invoked by the candidate's counsel and relied upon by the state trial court in declining jurisdiction over the petitioner's motion to vacate the sealing order. However, the district court's declaratory judgment is hollow: It recognizes the violation of the vital First Amendment right of access to a court file, but provides no remedy for the violation.

The court of appeals' reasoning illustrates the danger to future attempts by litigants to vindicate First Amendment rights under section 1983. The opinion states:

> The declaratory relief granted to this plaintiff eliminated the procedural bar to its intervention in the state court proceedings. The plaintiff offers no reason why this is not adequate relief or why it will suffer irreparable harm if it must return to state court to petition for disclosure of the documents.

The district court's opinion also wrongly implies that the petitioner had the time to litigate its challenge to the sealing order in state court. In fact, the district court's

order was entered the day before the general election, precluding any effort to seek relief in the state court.

Finally, the Fifth Circuit's opinion wrongly states that the petitioner failed to show that it was without an adequate remedy at law that would have justified injunctive relief. To the contrary, the petitioner suffered an irretrievable loss of its First Amendment right of access to candidate Hinojosa's divorce file, an injury that began before the first district court hearings in April 1996 and that continues to this day.

Because the court of appeals considered the district court's adjudication of the newspaper's claims to be tentative and possibly not preclusive in future litigation, it bears emphasizing that the district court entered a *final* judgment. (App. 28.) The district court's intention was for the parties to seek appellate review on the merits: "[C]learly I hope somebody goes to the Fifth Circuit because this is an issue that needs to be answered by somebody other than just a district judge. This needs Circuit attention." (App. 22.) The court of appeals did not heed this request from the district court. Obliquely, the court expressed reservations about the existence of a First Amendment right that were manifest in the oral argument of the case, by stating, "We express no view on the district court's handling of the burden of proof or on its decisions regarding the other issues in this case." (App. 2-3.)

The court's reluctance to reach the First Amendment issue may explain its resolve to ignore the merits. "But," as this Court has said, "the vitality of these constitutional

principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

Challenging the basis for the Circuit Court's order, *The Monitor* seeks a writ of certiorari to the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING PETITION

Section 1983 provides a federal cause of action that entitles a claimant to have a federal court declare whether a constitutional violation has occurred and, if so, provide a remedy for the deprivation. The decision by the Court of Appeals imperils the structure of the right to relief under 42 U.S.C. § 1983. This dramatic departure from this court's pronouncements and the pronouncement of the Court of Appeals for the First Circuit on the obligation of a district court to hear both the declaratory and injunctive claims for relief under 42 U.S.C. § 1983 provides a compelling basis for this court to review the decision of the Court of Appeals for the Fifth Circuit.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH *BROWN V. BOARD OF EDUCATION* AND THE FIRST CIRCUIT'S DECISION IN *RIVERA-PUIG V. GARCIA-ROSARIO*

The court of appeals erroneously held that interests of comity suggest that a district court should not grant injunctive or declaratory relief against a state judge who

has not had an opportunity to consider the merits of the plaintiff's claim.

In its rush to avoid judgment, the court of appeals misconstrued the record. The court incorrectly stated that *The Monitor* sought injunctive relief against the state judge, the Honorable Fernando Mancias. In fact, the newspaper sought only declaratory relief, because the 1996 amendments to section 1983 prohibit the district court from enjoining a state judge unless the state judge first refuses to comply with the federal court's declaratory judgment. (App. 31.) *The Monitor* sought injunctive relief against the state court clerk only. The court of appeals also ignored the salient fact that the state judge was a party who vigorously and repeatedly argued, in the district court and the court of appeals, that the newspaper was not entitled to relief on the merits.

The court of appeals purports to apply this court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to suggest that the newspaper should have launched an effort to relitigate the matter in state court following the entry of the district court's judgment. The Fifth Circuit's holding, however, conflicts with decisions of this Court and the First Circuit Court of Appeals. The First Amendment right to access court records generated in connection with court proceedings required to be accessible to the public can only be remedied by immediate relief. An order requiring access or providing the public an opportunity to oppose the closure of the proceedings or records in question is the only effective remedy for the loss of these rights. Such an order must take effect "with all deliberate speed" if it is to provide meaningful redress

for the First Amendment deprivation. *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 325 (1st Cir. 1992) (citing *Brown v. Board of Education*, 349 U.S. 294, 301 (1955)). These cases authoritatively obligate the federal courts to hear claims to enforce with injunctive relief judgments entered in actions brought pursuant to 42 U.S.C. § 1983 declaring a violation of First Amendment access rights.

What the circuit court did in this case is squarely at odds with the First Circuit's decision in *Rivera-Puig*. There a newspaper reporter sought access to preliminary hearings in criminal cases pending in the courts for the Commonwealth of Puerto Rico. When the reporter was denied access to these preliminary hearings, he sued the territorial (commonwealth) trial judge under 42 U.S.C. § 1983 for violation of his First Amendment right to access the state court hearings. The reporter sought and obtained a judgment declaring the commonwealth procedural rule that prevented his attending preliminary hearings to be unconstitutional. An injunction requiring access to the hearings was also sought as part of the relief sought by the reporter. However, the District Court refused to enjoin the commonwealth trial judge or the Commonwealth of Puerto Rico by requiring them to allow the reporter to attend preliminary hearings.

The declaratory judgment was affirmed on appeal, but the most significant part of the First Circuit's opinion in the case was its decision to remand the reporter's claim for injunctive relief. The court of appeals instructed the district court to "take such actions as necessary to achieve compliance with the declaratory judgment with all deliberate speed."

The circuit court's decision that federal courts and federal litigants should not address the *remedies* that flow from the federal court's determination that a federal constitutional right has been deprived by a state court judge frustrates the very purpose of section 1983, which was enacted to provide a *remedy* for such constitutional deprivations. Accordingly, review by this Court of the issue presented is clearly warranted.

II. THE DEPRIVATION OF PETITIONER'S FREE SPEECH RIGHTS CAUSED IRREPARABLE HARM JUSTIFYING INJUNCTIVE RELIEF.

The district court's final hearings, concluding one day before the general election, meant that the petitioner had no time to seek relief in state court. Recognizing this, the district court expressly rejected the respondents' argument that it should abstain from reaching the merits of the newspaper's claims. Abstention from hearing the petitioner's claim for injunctive relief would have left petitioner without a remedy, had any form of the abstention doctrine applied.

Strangely, the Fifth Circuit's second opinion states that comity required that the newspaper's opponent in this litigation, Judge Mancias, be given the chance to decide the merits in the state forum. (App. 2.) Comity is not the issue. The issue here is the federal courts' duty to hear claims within their jurisdiction, a duty that is especially crucial when First Amendment rights are involved. For a federal court to abstain in this case, where there is

no pending state proceeding, would be unprecedented. It would also strike at the heart of *The Monitor*'s section 1983 remedy.

Even when a parallel state proceeding is pending, only "exceptional circumstances" will justify the federal court's refusal to hear a federal claim. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976). The "unflagging obligation" of the federal courts to exercise the jurisdiction given them "is particularly weighty when those seeking a hearing in federal court are asserting . . . their right to relief under 42 U.S.C. § 1983." *Signad, Inc. v. City of Sugar Land*, 753 F.2d 1338 (5th Cir. 1985). Furthermore, even *Pullman* abstention, commonplace in section 1983 litigation, is inappropriate when First Amendment rights are at issue. *Louisiana Debating and Literary Ass'n v. The City of New Orleans*, 42 F.3d 1483, 1489 (5th Cir. 1995).

This case falls within none of the abstention models recognized by federal courts. *See Colorado River*, 424 U.S. at 814-17. When abstention is relevant, federal courts are exhorted to avoid piecemeal litigation. *Id.* at 818 (citing *Brillhart v. Excess Ins. Co.*, 316 U.S. 491-495 (1942)). The court of appeals' *sua sponte* directive to resubmit this litigation to Judge Mancias contradicts the letter and the spirit of these abstention decisions. *See also Rivera-Puig*, 983 F.2d at 320 (upholding refusal to abstain in section 1983 action against state judge whose orders violated First Amendment access rights).

In sum, the court of appeals' opinion must be vacated because it violates the fundamental principle that a federal court must not refuse to decide a case that is within

its jurisdiction. By affirming the district court's judgment, avoiding a decision on the merits, and shuttling off *The Monitor* to go repeat useless acts, the Fifth Circuit's decision runs afoul of this Court's *McClellan* decision:

> [T]he circuit court had practically abandoned its jurisdiction over a case of which it had cognizance and turned the matter over for adjudication to a state court. This, it has steadily been held, a federal court may not do.

McClellan v. Carland, 217 U.S. 268, 281 (1910).

So with none of the traditional forms of abstention applicable to these facts, the Circuit Court invoked *Lyons* to justify abstention of another kind. *Lyons* commands restraint by federal courts in enjoining state officers in the absence of irreparable injury that is both "great and immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Yet the violation of *The Monitor*'s First Amendment rights, which were recognized by the district court's declaratory judgment, created a need for injunctive relief that was great and immediate.

Without immediate declaratory and injunctive relief in its favor, *The Monitor* was unable to obtain, review, and distribute information bearing upon candidate Hinojosa's fitness to hold the congressional seat for which he was running in the general election the next day. The loss of First Amendment rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 & n.29 (1976). The court of appeals' conclusion that *The Monitor*'s First Amendment rights did not constitute irreparable harm conflicts with *Elrod*. Furthermore, the conclusion was hasty and uninvited. Neither the district

court nor any of the parties ever suggested that relief would be inappropriate for this reason.

Unlike the *Lyons* plaintiffs' constitutional claims, the newspaper's need for injunctive relief could not have been greater. Mr. Lyons alleged that he had suffered police brutality; this Court properly held that money damages would fully compensate him. *Lyons*, 461 U.S. at 111. In contrast, *The Monitor* cannot be compensated for the harm to its First Amendment rights with an award of money damages.

Further review is warranted, therefore, to resolve these conflicts regarding the federal courts' obligation to hear section 1983-based claims for injunctive relief following entry of a judgment declaring a violation of First Amendment rights.

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE TO THE RIGHT TO A REMEDY OF A LITIGANT WHOSE FREE SPEECH RIGHTS ARE VIOLATED

The reason for the rule that a federal trial court must provide a meaningful remedy for a constitutional deprivation is vital to the role played by 42 U.S.C. § 1983 in affording meaningful remedy to claimants. Had the federal courts simply declared constitutional violations in civil rights litigation 30 years ago, without supporting the declaratory judgments with remedies against the state actors, it is doubtful that the civil rights movement would have moved beyond the discussion stage.

By holding that the newspaper should have abandoned its federal remedies in favor of a fruitless return to the state court, the court of appeals leaves litigants seeking relief for violation of First Amendment access rights under 42 U.S.C. § 1983 in the lurch. Taken to its logical conclusion, the court's analysis creates a new rule of automatic abstention when a section 1983 litigant obtains a judgment in the district court declaring the violation of a litigant's First Amendment access rights. It requires the section 1983 plaintiff who succeeds in obtaining a judgment declaring the violation of his or her First Amendment rights to pursue relief in the state courts.

For the same reasons, loss of the First Amendment access rights, even for a brief time, causes harm that is severe and immediate. These considerations gave rise to this Court's pronouncement that race-based violations of constitutional rights must be remedied "with all deliberate speed" through issuance of injunctive relief. *Brown v. Board of Education*, 349 U.S. at 301. And without an obligation of the federal courts overseeing section 1983 litigation to hear claims for injunctive relief, especially after entering judgment declaring the requisite constitutional violation to support the requested relief, exercise of First Amendment rights could be rendered meaningless.

The Monitor's First Amendment right to access the state courthouse records is well-established by a host of federal and state decisions. *E.g., Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *In re Continental Illinois Sec. Litig.*, 732 F.2d

1302, 1308-10 (7th Cir. 1984); *Ex parte Weston*, 19 Media L. Rep. 1737 (S.C. Fam. Ct. 1991). Section 1983 exists to provide a federal remedy for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. *Golden State Transit Corp.*, 493 U.S. 103, 105 (1989).

By depriving *The Monitor* of a remedy for the enforcement of its First Amendment right, the Fifth Circuit's decision irreconcilably conflicts with this precedent. The need for immediate relief following entry of a declaratory judgment could hardly be greater where the judgment is based upon a violation of a First Amendment right. The First Amendment arguably requires injunctive relief. *Elrod*, 427 U.S. at 373-74 & n.29. At a minimum, section 1983 requires the federal court to fashion a meaningful remedy.

The remedy suggested by the court of appeals, however, is meaningless. The court of appeals' opinion assumes that *The Monitor* will be free to return to Judge Mancias and relitigate its access rights. However, it is extremely likely that the Hinojosas would raise collateral estoppel as a bar to further proceedings. A right, question, or fact distinctly put in issue and directly determined as a ground of recovery by a federal court of competent jurisdiction collaterally stops a party from relitigating the issue in a subsequent action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 324 (1979).

None of the exceptions to the collateral estoppel doctrine apply to this case. The district court conducted a plenary evidentiary hearing before denying the newspaper's request for injunctive relief. The fact that the

issues were decided in an equitable proceeding has no import. *Parklane,* 439 U.S. at 324. *The Monitor* has no complaints regarding the scope of the hearing afforded it by the district court. The district court followed the court of appeals' mandate, in its first opinion, to consider the merits of the section 1983 claims. All parties were given a full and fair opportunity to litigate their claims and defenses before final judgment was entered.

Thus, to suggest that the newspaper can return to the state court is no answer to the district court's procedural errors. This case was fully litigated in the district court, and the federal courts are the only forum for review of the district court's judgment.

The resolution of the issue in this case is one whose consequences are pervasive and substantial. If the court of appeals' analysis is permitted, it threatens the exercise of First Amendment rights and the utility of 42 U.S.C. § 1983 as a vehicle for relief. The importance of securing the exercise of First Amendment rights with the remedy that 42 U.S.C. § 1983 was designed to provide litigants warrants the grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. The judgment of the court of appeals should be vacated, and the case remanded with instructions to address the merits of the petitioners' First Amendment claims. This is an appropriate case for summary disposition on the merits, as provided by rule 16.1,

because the First Amendment rights at issue are irreparably injured by their deprivation for even minimal periods of time. *Elrod*, 427 U.S. at 374.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-41248

FREEDOM COMMUNICATIONS INC.,
Doing Business as the Monitor,

Plaintiff-Appellant,

VERSUS

FERNANDO MANCIAS,
Judge of the 93rd Judicial District Court
of Hidalgo County, Texas;
PAULINE G. GONZALEZ,
Clerk of Hidalgo County District Courts;
and
STATE OF TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(M-96-CV-046)

(Filed Oct. 09, 1997)

Before REYNALDO G. GARZA, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

We have before us only an appeal from the denial of an injunction ordering the release of certain state court divorce records. The grant of declaratory relief has not been appealed, and we do not consider it.

To obtain an injunction, a plaintiff must show irreparable harm. "The equitable remedy [under 42 U.S.C. § 1983] is unavailable absent a showing of irreparable injury. . . . " *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Part of showing irreparable injury is demonstrating that the plaintiff has no adequate remedy at law. *See id.*

The declaratory relief granted to this plaintiff eliminated the procedural bar to its intervention in the state court proceedings. The plaintiff offers no reason why this is not adequate relief or why it will suffer irreparable harm if it must return to state court to petition for disclosure of the documents.

Moreover, the interests of comity suggest that we should not order an injunction against a state judge who has not even had an opportunity to consider the merits, if any, to plaintiff's claim. "In exercising their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' " *Lyons, id.* at 112 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951))."

In the absence of irreparable harm, the district court did not abuse its discretion in denying injunctive relief. The judgment, accordingly, is AFFIRMED. We express no view on the district court's handling of the burden of

proof or on its decisions regarding the other issues presented in this case.

[Letterhead names omitted in printing]

MEMO

TO: ALL COUNSEL
RE: CAUSE NO. C 1946 85 B
FROM: FERNANDO G. MANCIAS
/s/ Fernando Mancias
DATE: APRIL 1, 1996

Court has reviewed cases submitted by Mr. Rangel and Mr. Bussian. Court finds as follows:

1. Court has no jurisdiction to consider Monitor's Motion to Intervene.

2. Court denies request by Monitor to intervene.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FREEDOM COMMUNICATIONS, PLAINTIFF, VS. HON. FERNANDO MANCIAS, ET AL, DEFENDANT.	CIVIL ACTION CA-M-96-46 CORPUS CHRISTI, TEXAS APRIL 8, 1996 8:04 A.M. (United States District Court Southern District of Texas Filed May 8, 1996)

TRANSCRIPT OF HEARING ON
PRELIMINARY INJUNCTION

BEFORE THE HONORABLE
HAYDEN W. HEAD, JR., JUDGE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT

APPEARANCES FOR:

THE PLAINTIFF:

MR. R. BRIAN HUNSAKER
ATTORNEY AT LAW
112 W. OCEAN BOULEVARD
LOS FRESNOS, TEXAS 78546

MR. JOHN BUSSIAN
ATTORNEY AT LAW
STE 1100, UNIVERSITY TOWER
DURHAM, NC 27707

THE COURT RECORDER: MS. JUDITH F. ALVAREZ

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE: JUDITH M. GARCIA, 710 BUFFALO STREET, SUITE 406 CORPUS CHRISTI, TEXAS 78401, (512) 882-5753

APPEARANCES FOR:

THE PLAINTIFF:	MR. JEFF NOBLES HAYNES & BOONE 1000 LOUISIANA STREET SUITE 4300 HOUSTON, TEXAS 77002
THE DEFENDANT HON. FERNANDO MANCIAS:	MR. DARRELL BARGER HUNT, HERMANSEN, McKIBBEN & ENGLISH 555 N. CARANCAHUA STREET SUITE 1100 CORPUS CHRISTI, TEXAS 78478
THE DEFENDANT PAULINE G. GONZALEZ:	MR. PAUL RALEIGH RALEIGH & VELA 545 N. UPPER BROADWAY SUITE 1000 CORPUS CHRISTI, TEXAS 78476

* * *

[p. 51] RULING

THE COURT: Here's what we're going to do: I'm going to rule. You're in a hurry, the best thing I can do is give you a quick answer. If you want to try to go to the Court of Appeals with it, you've still got time to do it. I'm going to deny the application for preliminary injunction. I'm going to do it basically on the facts that the plaintiff has recited here in court, that I don't find any

challenge to those facts [p. 52] as stated by plaintiff's counsel. I'm going to deny the application based upon the fact that I believe that this matter has already been heard by a State Court of Texas, that it is res judicata, that the appropriate approach at this point is to the Appeals Courts in the State of Texas, not to the federal system, that this is a matter of basically final judgment over which this Court declines to exercise any power because of the precepts and concepts of issue preclusion. We have the same parties, the same subject matter, it's been decided. I do not believe that as a right that the plaintiffs may jump ship into a different jurisdiction and hear it at this point. Therefore, your request is denied, and you still have some time to get to wherever you feel you need to go. Thank you very much.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FREEDOM COMMUNICATIONS, INC. d/b/a THE MONITOR	§	
V.	§	C.A. NO. M-96-046
HON. FERNANDO MANCIAS and PAULINE G. GONZALES	§	

ORDER DENYING PETITIONER'S APPLICATION FOR PRELIMINARY INJUNCTION

(Filed Apr. 9, 1996)

Mr. and Mrs. Hinojosa were divorced approximately ten years ago and their divorce records were then sealed by order of the Honorable Judge Mancias of the 93rd District court of the State of Texas. Mr. Hinojosa is now a candidate for the United States House of Representatives. Plaintiff is a local newspaper and believes that the sealed divorce records contain matters of public interest. The Hinojosas disagreed and refused the plaintiff's request.

Plaintiff made an emergency application to the 93rd District Court to intervene in the divorce proceeding and sought an order to unseal the divorce records. Plaintiff pled and argued common law and federal constitutional law rights of access to the records. Judge Mancias denied the motion to intervene and motion for access on jurisdictional grounds, most likely on authority submitted by Mr. Hinojosa, who had intervened. *Times Herald Printing Co.*

v. Jones, 730 S.W.2d 648, 649 (Tex. 1987); *First Alief Bank v. White*, 682 S.W.2d 251 (Tex. 1984).

Plaintiff did not seek appellate relief in the Texas state courts. The appropriate relief would have been by direct appeal in the Texas state courts. *Diocese of Galveston-Houston v. Stone*, 892 S.W.2d 169 (Tex. App. – Houston [14th Dist.] 1994, no writ) (determination regarding subject matter jurisdiction is not properly attacked by mandamus since adequate remedy exists on appeal), or perhaps mandamus. Instead plaintiff brought this action under 42 U.S.C. § 1983 to have the Court hold opposite Judge Mancias, i.e. that he does have jurisdiction to consider the plaintiff's request. The plaintiff further requests the Court to hold a hearing to balance the interests of the parties – public versus private – and ultimately to release the records to the plaintiff. *Richmond Newspapers, Inc. v. Virginia*, 100 S.Ct. 2814 (1980); *Nixon v. Warner Communications, Inc.*, 98 S.Ct. 1306 (1978).

The Court declines and denies plaintiff's request for injunctive relief. This matter was presented to Judge Mancias on all of the matters before this Court, and those that were not could have been presented. The same parties are before this Court. Under these circumstances, the matter is dismissed on collateral estoppel and res judicata grounds. *Hogue v. Royse City, Texas*, 939 F.2d 1249, 1252 and n. 2 (5th Cir. 1991) ("Under Texas law, an existing final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit" as well upon "all legal theories and claims that were never litigated but that

should have been advanced in connection with a particular cause of action.")

ORDERED this 8th day of April, 1996.

/s/ H.W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FREEDOM COMMUNICATIONS, INC. d/b/a THE MONITOR	§	
V.	§	C.A. NO. M-96-046
HON. FERNANDO MANCIAS and PAULINE G. GONZALES	§	

FINAL JUDGMENT

(Filed Apr. 9, 1996)

The Court renders final judgment for the respondents. The respondents are awarded their costs.

ORDERED this 8th day of April, 1996.

/s/ H.W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40359

FREEDOM COMMUNICATIONS, INC. d/b/a The Monitor,

Plaintiff-Appellant,

versus

THE HONORABLE FERNANDO MANCIAS, Judge of the 93rd Judicial District Court of Hidalgo County, Texas; PAULINE G. GONZALEZ, Clerk of the Hidalgo County District Courts,

Defendants-Appellees.

Appeal from the United States District Court for The Southern District of Texas
(M-96-CV-046)

(Filed Oct. 17, 1996)

Before REYNALDO G. GARZA, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

This appeal presents the question whether the district court correctly dismissed the complaint on the basis of res judicata. After reviewing the record, studying the briefs, and considering the arguments presented to this court, we have concluded that the dismissal was erroneous.

Res judicata attaches only when there has been a final judgment rendered by a court of competent jurisdiction on the merits of a claim. *See, e.g., Eagle Prop., Ltd. v. Scharbauer,* 807 S.W.2d 714, 718 (Tex. 1990). In this action, the state court dismissed the complaint for lack of jurisdiction. A dismissal for lack of jurisdiction does not operate as a judgment on the merits for purposes of res judicata. *See, e.g.,* Fed. R. Civ. P. 41(b). Additionally, in the state court, *The Monitor* only sought to intervene in a pre-existing action. Ordinarily, the denial of a motion to intervene does not result in a bar to future litigation on the basis of res judicata. *See, e.g., In re Troy Dodson Constr. Co.,* 993 F.2d 1211, 1214 (5th Cir. 1993); 18 Charles A. Wright Et Al., *Federal Practice and Procedure* § 4438, at 352 (1981).

Because we conclude that res judicata does not bar the present action, we remand the case to the district court for consideration of the merits of the section 1983 claim. Upon remand, it seems to us that the court must first examine whether *The Monitor* has alleged a constitutional right by virtue of their claim that the First Amendment grants them the right to have a case-by-case review of sealed court files to determine whether their alleged right to the information is outweighed by the privacy interests of those connected with the file whose privacy is protected by the sealing order. Second, if the court finds

that *The Monitor* has effectively raised a constitutional claim, then the court must determine whether the Texas statutes, as applied in this case, result in a denial of that right. If so, the court then must consider whether the Texas statutes should be stricken on the basis of their unconstitutionality as applied in this case and, finally, if the Texas statutes are being unconstitutionally applied in this case, whether the state court judge should be ordered to conduct a review of the sealed file to determine the relative weights of *The Monitor's* right to the information and the privacy interests protected by the sealing. Our suggestion set out above as to how the district court might proceed is not intended to straight-jacket the district court, which may proceed to determine the merits of the plaintiff's claim in its own good judgment.

Finally, we might observe that, in the course of these proceedings, the district court may see the need to invite the State of Texas to become a party in order to defend its statutes. Indeed, if the plaintiff seeks to declare a state statute invalid, the state must be made a party.

We therefore REVERSE the district court's holding that the state court decision bars, because of res judicata, the present action and REMAND this action for further consideration.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FREEDOM COMMUNICATIONS, INC.,	)	CIVIL ACTION
PLAINTIFF,	)	CV-M-96-46
vs.	)	CORPUS CHRISTI,
MANCIAS, ET AL,	)	TEXAS
DEFENDANTS.	)	NOVEMBER 4, 1996
----------	)	(Filed Nov. 5, 1996)

HEARING (COURT'S FINDING)

BEFORE THE HONORABLE
HAYDEN W. HEAD, JR., JUDGE,
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT

APPEARANCES FOR:

THE PLAINTIFF:

MR. JOHN A. BUSSIAN, III
UNIVERSITY TOWER,
SUITE 1100
DURHAM, NC 27707

MR. JEFF NOBLES
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SUITE 4300
HOUSTON, TEXAS 77002

MR. R.B. HUNSAKER
112 W. OCEAN BLVD.
LOS FRESNOS, TEXAS 78566

THE DEFENDANTS:

FERNANDO MANCIAS	MR. DARRELL BARGER 800 N. SHORELINE, SUITE 2000N CORPUS CHRISTI, TEXAS 78401
CLERK OF HIDALGO COUNTY DISTRICT COURTS	MR. PAUL J. RALEIGH 545 N. UPPER BROADWAY, SUITE 1000 CORPUS CHRISTI, TEXAS 78478
OFFICE OF THE ATTORNEY GENERAL	MS. NANCY A. TREASE P.O. BOX 12548 AUSTIN, TEXAS 78711

* * *

[p. 3] THE COURT: Okay, here's my answer. The Court finds that there was a sealing of divorce records at the conclusion of a public divorce. The Court finds that that is not an uncommon practice in Hidalgo County. The Court finds that the plaintiffs requested the records and were denied by a state actor. The Court finds there is a qualified right under the First Amendment to court records in civil cases, that that qualified record – excuse me, that that qualified right exists during litigation in some instances and in some instances after litigation. The Court holds that First Amendment right can in appropriate cases apply to divorce cases because the Court cannot help but find that there has been a tradition of accessibility and at the same time there has not. And as I said, that there can be a significant role for the court system and the press in examining the family court system. We tend to say, well that's just divorce, we'll put that

over there in this corner of the courthouse and everybody can go over there and deal with those issues. But the fact is divorce is probably the most frequently visited place by citizens of any court and those courts must run well, they must run efficiently, they must run without appearance of favoritism, as all other courts. So I think that there's obviously a significantly positive role for the press to play in dissolution cases.

In this case and in typical cases, however, where [p. 4] you have a state rule placing all inquiry beyond the view of the press, there has to be some legitimate public interest in doing so and it must be narrowly tailored.

I'm going to put a little shade on the law here, a little slant on that analysis. And I don't intend to apply the burden that way. Once the defendants have come forward and placed the case under inquiry in the divorce arena, I'm going to move the burden to the plaintiff instead of to the defense. I think that the Supreme Court of Texas needs to be given credit for its recognition that divorce is different and it reflects a different level of litigation than any other level. Divorce cases are open most of the time; people come and go. But there are occasions where the Supreme Court obviously recognizes for its citizens that closure is appropriate. If third parties want to enter what all of us recognize are frequently sorry displays of all human nature, then there better be a good reason for it. And I put the burden in these kinds of cases not on the defendants to justify the closure but on the plaintiffs to establish that the closure is unreasonable; that is to demonstrate a particularized need for the information and to demonstrate that there is no other way that they can get the information. Not up to the defendants to say, "Well,

you can get the information some place else." Not up to the defendants to say, "You don't really need this information." But up to the plaintiffs to say, "All right, we recognize this is special stuff." We recognize [p. 5] that the defendants – not here – but the divorce couple had no choice but to come before the public forum. They were trapped into that arena. The State made them come forward into that arena to separate themselves. And having been coerced to come before the State to terminate, then the State may and Government may not say, and not only that, you have to justify to the rest of the world why your reasons for divorce should not be disclosed; instead it should be up to the plaintiffs to justify why those reasons should be given credit and why the records should be open.

So, certainly didn't really follow much law there except that's the way I see these unusual cases shaping in the balance of the way these kinds of cases are. There are no precedents for which – upon which this Court can really rely. I do think that the flow of cases indicates that these cases are subject to a qualified First amendment right. But the balance can't be the same given the kind of content that we have. We have what everyone's always hoped when they enter it, the most sacred relationship that will ever be. Unfortunately for 40 to 50 percent of our population it turns out not to be the case. And when it's not the case and when we're forced to come before the courts of our land to expose our weaknesses, then we should have some protection as citizens from exposing our spoils of our behavior.

So, it's up to anybody else who wants it to convince [p. 6] some trial judge elected for purposes of making

difficult decisions to say who gets opened, but the burden is upon the plaintiff to say when and to prove when and why.

Now in this case, I don't have Mr. and Mrs. Mancias in – Mr. and Mrs. – that's the judge – Mr. and Mrs. Hinojosa. I do have Judge Mancias but he can't stand in the position of the Hinojosas and that's been shown to me to be true by the last time the Fifth Circuit talked to me about this case. So the Hinojosas weren't here then; they're not here now. Because they're not here now, I don't believe that they have had an opportunity to defend the sanctity of that divorce. More importantly than that, they haven't been given an opportunity to respond. So we have a failure of parties. Even if we didn't have a failure of parties on the injunction issue, and it can only go to the injunction issue, I don't believe that it goes to the declaratory issue of the First Amendment right because there's really two halves to this case.

I don't believe that the plaintiffs have made a case under my view of how perfect this world ought to be. That is, the balance that the press ought to have to – the burden of proof that the press ought to have to meet. We have a man who is running for public office and we have an election. That's all we have. The newspaper says that's enough. I don't think it's enough. I don't think it's enough because the proceeding was at one time open. I don't think it's enough for a number of [p. 7] other reasons.

First of all, I think the press can use other methods of exploration in the community to determine the issues that

may surround the marriage, and I [sic] wasn't demonstrated to me that there was any significant effort in that direction.

Secondly, this candidate has been, apparently from what I understand from the evidence, in the region a while; he has been and is a successful businessman about which there has been an inquiry of his financial activities. All those matters being true, there are many other indicia of a candidate's character and qualifications for office that can be adequately revealed to the public without intrusion, especially under the circumstances when there is no demonstrated particularized boil, for lack of a better word, that the press seeks to lance. It is, in fact, a fishing expedition. And while it is true the press are paid to fish, and that's what they do by investigation, the pond that they're fishing in has some sanctity and some value until they can prove they're entitled to poach in the pond.

Additionally, the particular man involved, as his candidacy he was not a congressman for that office at the time of the divorce. None of this apparently relates to any activities on his part while he held public office. None of it deals with, as I understand it could be, any misdeeds or lack of qualifications demonstrated while in public office. I'm giving my [p. 8] decision, therefore, that there is not relevant [sic] to activities while in public office and further that the activity sought outside of office can be gained from other reasons, and the parties are not here to – and have not been named in the injunctive action, the Court does not believe that an injunction should lie.

The wife and the daughter are not public figures. To extend an unfettered right to look into any divorce decree

anywhere would be clearly inappropriate. The only way the press is here at all is the fact of the candidacy, which is significant but not completely determinative in my view.

Now, for the foregoing reasons, the Court denies injunctive relief requested. The declarative relief is as announced.

I see no further benefit to anything other than the drafting of an order and judgment in accordance with what I have just said, and you can go forward with the litigation or your activities wherever they may take you.

You're excused.

Anything further I need to do?

MR. BUSSIAN: No, Your Honor. Might I ask a question about the ruling? Does the ruling on the declaratory relief side include a finding that Texas Rules of Civil Procedure 329B and 60 are unconstitutional as applied to our right to intervene?

[p. 9] THE COURT: As applied to what?

MR. BUSSIAN: Our right to intervene and ask for an unsealing order from Judge Mancias down in his court.

THE COURT: This has been my problem about how I tell a State District Judge that he's – what do I do about that? I mean, every [sic] since you brought this case to me, you know I've had that problem. And because I don't think I was the right court to go to. I mean, I saw your dilemma. I think there – so the answer to your question is – restate your question.

MR. BUSSIAN: Per the Fifth Circuit's advice – is there a First Amendment right, and you said there's a qualified one. Does it burden our right of access by having to run through the 329B and Rule 60 gauntlet. We, I guess, hoped that the Court's declaratory relief will say that it does, and then if so, can – will the Court declare – I think in the words of the Fifth Circuit – that those rules are unconstitutional as applied. And, of course, the last question you've answered is should you then enjoin Judge Mancias to do anything and you've answered no to that. But the first three questions would be extremely important to us to wonder whether we can now take a declaratory judgment and go back to him and say, "This is what's been declared." We can go around the *Jones* case because it's unconstitutional as applied to our request to have you look at this under the strictures you've outlined here.

THE COURT: Or they can go on to the Court of Appeals. [p. 10] And clearly I hope somebody goes to the Fifth Circuit because this is an issue that needs to be answered by someone other than just a district judge. This needs Circuit attention. Well, the declaratory judgment is obviously based upon, it seems to me, the fact that 329B as long as the State of Texas is not going to allow the District Courts the access to grant jurisdiction over these matters, 329B clearly stands in the way and has got to stand in these types of cases, it's got to fall to the First Amendment. And so I'm not going to tell Judge Mancias what he should or shouldn't do. I don't think that there's any need for me to tell him what to do at this point.

MR. BUSSIAN: But if the declaratory judgment says what you just said, Judge, then I guess we'll take it upon ourselves to –

THE COURT: He can do what he wants. I'm not going to give injunctive relief for the reasons I said. I think it's up to you to make your case. I think the Hinojosas have a right to be present – (blank spot on tape) – needs to have the benefit of my thought that it's up to the press, and he can follow that or not. He may say, "No, I don't agree. I agree with you on that burden." Then they can appeal. They may appeal anyway. The State may appeal anyway. Please do. Love for this case to have an answer. So we'll try to get you something in writing very quickly. I think you should supplement it with my ruling from the bench if you want something from it because if I'm [p. 11] going to get you anything in a hurry, you need – you need something in writing soon. If you'll excuse me, I'll get right to that.

* * *

Transcribed by: Jean Bartz

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

/s/ Jean Bartz
Jean Bartz

November 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FREEDOM COMMUNICATIONS, INC.	§	
VS.	§	C.A. NO. M-96-46
HONORABLE FERNANDO MANCIAS, ET AL.	§	

ORDER GRANTING PARTIAL DECLARATORY RELIEF AND DENYING INJUNCTION
(Filed Nov. 4, 1996)

Plaintiff, Freedom Communications, Inc., seeks access to divorce records of Ruben and Bertha Hinojosa, who were divorced in 1987 in Hidalgo County, Texas. Mr. Hinojosa is now a candidate for United States Congress from the 15th Congressional District where plaintiff owns and operates *The Monitor,* a regional newspaper. Relying on Texas Rules of Civil Procedure 60 and 329b, and established state law, *Times Herald Printing Co. v. Jones,* 730 S.W.2d 648 (Tex. 1987), the Honorable Fernando Mancias denied plaintiff's application to examine divorce records that he sealed in the Hinojosas' divorce.

Plaintiff has now sued Judge Mancias and Pauline Gonzalez, District Clerk of Hidalgo County, Texas, to gain access to these same records of the Hinojosas' divorce, alleging a First Amendment right to examine court records. 42 U.S.C. § 1983. The Court analyzes this claim of right to examine court records under the authority of *Press-Enterprise Co. v. Superior Court,* 104 S. Ct. 819, 822-24 (1984), and a series of many cases since that decision

authorizing access by the court to its process and its documents. *In re Reporters Committee for Freedom of the Press,* 773 F.2d 1325 (D.C. Cir. 1985); *Rushford v. New Yorker Magazine, Inc.,* 846 F.2d 249 (4th Cir. 1988); *In re Cincinnati Enquirer, a Division of Gannett Satellite Information, Inc.,* 94 F.3d 198 (6th Cir. 1996). The right of access is not absolute. *Globe Newspaper Co. v. Superior Court* 102 S. Ct. 2613, 2620 (1982).

For the reasons stated on the record, the Court holds that there is a tradition of press access to civil litigation in Texas and that such access plays a positive role in the functioning of its court system. In denying all access to all sealed records, Texas Rules of Civil Procedure 60 and 329b burden this qualified First Amendment right that plaintiffs have to access of court records and, as applied to this case, this burden is an unconstitutional one. *See Globe Newspaper Co.,* 102 S. Ct. 2613 (holding unconstitutional a mandatory closure rule which prohibited case-by-case analysis).

In addition to the declaratory relief previously given, the plaintiff seeks injunctive relief. For the reasons stated on the record and in this decision, the Court denies all injunctive relief.

First, the Hinojosas were not made parties and have a fundamental, if not paramount, interest in the disposition of the records in their case. Although it could have done so, plaintiff did not make them parties before this Court. Because the Hinojosas are not here to protect their interests, the Court declines in an equitable proceeding to grant the relief requested. Second, the Court imposes on

the plaintiff a burden of establishing a clear and substantial need for access to sealed divorce records. In the ordinary case where First Amendment freedoms are imperiled by government rules, courts have traditionally held that it is the government that must establish the necessity for the rule and narrowly tailor its application to the circumstances at hand. *Press-Enterprise Co.*, 104 S. Ct. at 824. The Court holds that analysis does not appropriately balance societal needs in the examination of records from divorce proceedings.

Divorce proceedings have been recognized by the law to bear special sensitivity. Tex. R. Civ. P. 76a; *Nixon v. Warner Communications, Inc.*, 98 S. Ct. 1306, 1312 (1978). Unlike the dissolution of commercial partnerships, it is only parties to marital partnerships who must use a public forum to dissolve their most private and intimate relationship. It is crudely inconsistent for government to require a divorce in a public forum and then require the parties to disclose publicly the grounds for their private turmoil.

As sole grounds for the right to examine the divorce records, plaintiff urges that Mr. Hinojosa is now running for public office. However, plaintiff does not establish any particularized need for sealed divorce records. Mr. Hinojosa was not a public figure at the time he was divorced. The plaintiff has not offered to the Court any particular character or legal flaw in Mr. Hinojosa that plaintiff believes these records will confirm or disclose. Plaintiff has not demonstrated that it has used all other reasonable means of inquiry. As Mr. Hinojosa has been a visible member of his community for a number of years, there are ample opportunities for the press to learn of his

qualifications for public office outside of divorce records. In any event, Mrs. Hinojosa and her children remain private citizens.

For the foregoing reasons, injunctive relief is denied.

ORDERED this 4 day of Nov, 1996.

/s/ H. W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FREEDOM COMMUNICATIONS, INC.	)	
V.	)	CA. NO. M-96-46
HONORABLE FERNANDO MANCIAS, ET AL.	)	

FINAL JUDGMENT

(Filed Nov. 04, 1996)

For the reasons stated in the Order Granting Partial Declaratory Relief and Denying Injunction, the Court declares that plaintiff has a qualified First Amendment right to examine court records and that, as applied to this case, Texas Rules of Civil Procedure 60 and 329b unconstitutionally burden that right because plaintiff has no opportunity to be heard on its motion to unseal the records.

On hearing, the plaintiff failed to meet its burden of establishing a clear and substantial need for the records, and therefore the Court denies all injunctive relief.

ORDERED this 4 day of Nov., 1996

/s/ H. W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-41248

FREEDOM COMMUNICATIONS INC, doing business as The Monitor

Plaintiff-Appellant

v.

HONORABLE FERNANDO MANCIAS, Judge of the 93rd Judicial District Court of Hidalgo County, Texas; PAULINE G GONZALEZ, Clerk of Hidalgo County District Courts; STATE OF TEXAS

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, McAllen

ON PETITION FOR REHEARING

(Filed Dec. 4, 1997)

Before REYNALDO G GARZA, SMITH, and WIENER, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellant Freedom Communications, Inc. in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

42 U.S.C.A. S 1983

1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Texas Rules of Civil Procedure, Rule 60.

INTERVENOR'S PLEADINGS

Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

Texas Rules of Civil Procedure, Rule 76a

SEALING COURT RECORDS

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the

motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need for specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific

portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records

sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Texas Rules of Civil Procedure, Rule 329b

TIME FOR FILING MOTIONS

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until

thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by

this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.